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No. ~~3601~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA (a corporation), as claimant of the Japanese Steamship "KOREA MARU", her engines, boilers, boats, tackle, apparel and furniture, and UNITED STATES FIDELITY & GUARANTY COMPANY (her stipulator),

Appellants,

vs.

CHARLES D. WILLITS and I. L. PATTERSON, copartners doing business under the firm name of WILLITS AND PATTERSON,

Appellees.

BRIEF FOR APPELLEES.

EDWARD J. McCUTCHEN,
FARNHAM P. GRIFFITHS,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Appellees.

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CHARLES D. WILLITS and I. L. PATTERSON, copartners doing business under the firm name of WILLITS AND PATTERSON,

Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

On or about July 7, 1917, appellees delivered to the Japanese Steamer "Korea Maru", at the port of Manila, 542 barrels of cocoanut oil, for transportation to the Port of San Francisco. Four hundred and forty barrels were stowed in a compartment known as No. 5 tank; the balance of 102 barrels was stowed in No. 7

hold. During the voyage a great quantity of the oil escaped from the barrels stowed in No. 5 tank. This oil found its way into the ship's bilges, through her scuppers, and was pumped overboard.

Appellees contend, and the lower court found as a fact, that the stowage of the barrels of oil in No. 5 tank was negligent and improper. Most of the barrels in that compartment had shrunk during the voyage; the hoops were off some of them and the heads of many of them were broken.

It is admitted that the oil, when received by the ship, was in good order and condition, and in liquid form. The record shows that 245,717 pounds of oil were delivered to the vessel, and that 143,664 pounds only were discharged at San Francisco. The ship failed to account for the loss of 102,053 pounds of the oil. One per cent was found to be the normal leakage in shipments of cocoanut oil in barrels. Such normal leakage, according to the finding of the trial court, occurred in No. 7 hold, where the 102 barrels were stowed. That percentage of 2457 pounds, was in this case deducted from the entire shipment, leaving a shortage of 99,596 pounds of oil, for the value of which the court below found appellant liable.

Some months after the arrival of the vessel at the Port of San Francisco a quantity of oil, said to have been subsequently taken from the ship's bilges, was tendered to appellees on account of the shortage. $1140.73 was realized on account of the sale of this latter oil, and credit was given to appellant for that

sum. A decree for the value of the oil lost, less the aforesaid average leakage on the entire shipment, and the aforesaid credit of $1140.73, was duly entered against the ship. Thereafter this appeal was taken by her owner.

Questions of fact only are presented on this appeal. They were resolved against the appellant by the trial court, in an opinion fully supported by the evidence taken in open court.

Argument.

I.

This is not a case in which the ship's conduct entitles it to much consideration. It may be that cocoanut oil is susceptible to leakage, and therefore requires special care in its custody and stowage in transit, and that in some cases a vessel which does its best by careful attention to the stowage and vigilant ventilation may ask a court to find the leakage to be due to defective containers, or the inherent qualities of the oil. But the "Korea Maru's" conduct was not meritorious. She accepted for carriage, at very high freight, a commodity which she admits needed special care against leakage, and, so far from giving such special care, placed it in the compartment of the ship most calculated to promote leakage, namely, the No. 5 tank.

Number 5 tank may fairly be described as a furnace. This compartment is directly abaft the engine-room, and is separated from it by a steel bulkhead. It is also

raised off the floor of the thrust recess, a part of the engine-room, and is separated therefrom by a steel floor (58)*. On each side are the fresh water tanks, and separating those tanks from the compartment in which the oil was stowed are wooden bulkheads, thus making a square compartment. Through it two steel man escapes pass (58). They also serve as outtake ventilators, by means of which the hot air from the engine-room passes to the top deck and out of the vessel (67). This hot air passing through the escapes heats them (68) and if the large doors opening from them into the compartment were open, as testified to by the ship's officers, all of the hot air leaving the engine-room would naturally rise, pass through them into the compartment, and practically make a furnace out of it (58-68,69). One of the tanks separated from the compartment by the wooden bulkhead contained hot water (58, 68). A portion of the hatch opening from the weather deck opened into this compartment through the 'tween decks. Upon this voyage the hatch-covers were on the 'tween decks hatch and about seven feet of cargo was stowed on top of them (172-224, 225).

It is clear, then, that this cargo compartment, which was loaded to capacity with cocoanut oil (215) was completely enclosed (67, 76) and surrounded, at one end by heat from the engine-room, at the bottom by heat from the steel floor separating it from the engine-room, and on the side by heat from the hot-water tank. In addition, excessive heat from the engine room was

*Reference is to page in apostles. Similar references will be used throughout.

at all times either passing through the man escapes located in the tank, or it was, on the testimony of the ship's officers, actually passing from the engine-room up those escapes, through the open doors, and into the compartment.

Cocoanut oil should be stowed in a cool place and given ventilation. It should not be subjected to heat.

Ventilation is imperative for the proper stowage of cocoanut oil. The strongest argument in support of that contention is the extremes to which the ship's officers went in testifying to the ventilation of No. 5 tank, in their endeavor to show that that compartment would receive ample ventilation on the voyage. They admitted that ventilation was necessary for such cargo. Captain Ota testified upon that point as follows:

> "Q. In your opinion, is oil cargo that requires a great deal of ventilation?
>
> A. It largely depends upon the kinds of oils you accept as cargo, *but any cocoanut oil, I think it is better to give air ventilation.*" (228, 9)

The chief officer of the vessel gave similar testimony (170, 171).

The testimony of Captain Rinder (39), and Mr. Murray (139) is to the same effect. In fact, the uncontradicted testimony establishes the imperative necessity of ventilating cocoanut oil. The uncontradicted testimony also shows that such oil should be stowed in a cool place where it will not be subjected to heat (54, 109, 116, 123).

Upon this subject, the chief officer testified as follows:

> "Q. Cocoanut oil is a cargo that requires a cool space, does it not?
> A. A cooler space is better.
> Q. Particularly so in hot weather?
> A. Yes, it is." (170, 1)

See also the letter of the chief officer, addressed to ship's agent.*

It is apparent, therefore, that cocoanut oil requires stowage in a cool place, with ventilation.

In considering the propriety of the stowage of the oil in No. 5 tank, the court should bear in mind that the appellant accepted the oil for transportation with knowledge of the admitted fact that it required special care in stowage. The language of this court in

The Aki Maru, 255 Fed. 721, 3,

is applicable. It was there said:

> "The carrier having accepted the eggs, and it being plain that eggs are a kind of freight which requires special care in stowage, we inquire whether the lower hold No. 5 hatch was a proper place to stow the eggs."

II.

THE STOWAGE OF 440 BARRELS OF THE COCOANUT OIL IN No. 5 TANK WAS IMPROPER.

This compartment was without ventilation.

The uncontradicted testimony shows that tank No. 5 did not have any ventilation. The following appears in the record:

*Libelant's Exhibit 8, on file in this court as an original exhibit.

"Q. Captain, assume that the hatch boards are on No. 5 tank, and the steel door opening into the tank from the emergency escapes is closed and bolted, and cargo is stowed on top of the hatch boards to a height of seven feet, is there any possible chance for air to get into that compartment?

A. Absolutely none; it then becomes airtight." (86)

Similar testimony was also given by other experts who were familiar with this compartment (37, 38, 58, 69). The absence of ventilation is conclusively proved by the testimony of Captain Curtis, appellant's witness (117).

Tank No. 5 was subjected to excessive heat.

This compartment was not only without ventilation, but it was also subjected to excessive heat. The testimony makes that fact clear. Upon this point, Captain Rinder testified:

"Q. Captain, assume that the fresh water tanks alongside of the No. 5 tank had hot water in them, would that have a tendency to heat No. 5 tank?

A. Certainly; the hot water tanks on each side are bound to heat it. (39, 40)

* * * * * * *

Q. Would the hot air passing from the engine, through these emergency escapes, have a tendency to heat that compartment?

A. Certainly; it would heat the four sides of the steel escape. (40)

* * * * * * *

Q. Your statement that hold No. 5 was an improper place is based upon what?

A. My practical knowledge of the heat that would be generated from the engine-room all around that compartment." (43)

The testimony of Captain Lehnhardt, a man who sailed in the "Korea Maru" in all positions from carpenter to second mate, conclusively shows that No. 5 tank was practically a furnace. His convincing testimony follows:

> "Q. Is there any heat in that compartment from the engine-room?
> A. Yes, it comes up through the escapes; it is right over the engine-room, the after part of the engine-room.
> Q. Would any hot air passing through those emergency escapes from the engine-room heat the steel sides of those escapes?
> A. Yes, naturally; the deck would be hot, too.
> Q. The deck would be hot as well?
> A. Yes.
> Q. That is the steel deck?
> A. That is, the bottom of No. 5 tank? A. Yes." (58)

A vivid description of the compartment, and of the manner in which it is subjected to excessive heat, was also given by Captain Rudden, a master of considerable experience, who was chief officer of the "Korea Maru" for several years. He testified as follows:

> "Q. Has the engine-room any effect upon No. 5 tank with respect to heat?
> A. It certainly has.
> Q. If this door appearing on the emergency escape of No. 5 of Exhibit 2 were closed, Captain, would the hot air passing through it have any effect on the steel emergency escape?
> A. On the four sides of it, yes.
> Q. What effect would it have?
> A. It would heat it.
> Q. If that door appearing in Libelant's Exhibit 2 were open, Captain, on the voyage from Manila to San Francisco, as testified to by the master and

first officer of this ship, what sort of air would enter No. 5 tank from those doors.

A. You would have excessive heat.

Q. What sort of air would get in there?

A. Excessive heat.

Q. What sort of air would get in there?

A. Hot air.

* * * * * * *

Q. Would the heat of the engine room on the floor of that No. 5 tank have any effect upon heating No. 5 tank?

A. Yes.

Q. Then that tank is practically surrounded by heat?

A. It is completely surrounded by heat, except on the ship's sides." (68, 69)

It is obvious that the witness was referring to the skin of the ship when saying "on the ship's sides". These sides were some twenty-five feet away from the wooden bulkhead separating the fresh water tanks from the compartment in question.

Captain Brown testified to the same effect (86, 87, 88).

Captain Curtis, appellant's witness, testified as follows upon this subject:

"Q. That tank is right directly abaft the engine-room, isn't it?

A. Yes.

Q. Would the heat of the engine room have any effect on that tank?

A. Oh, yes.

Q. What effect would it have on that tank?

A. It would make it warm." (117)

If any doubt existed as to the excessive heat of this compartment on the voyage in question, it was banished by the experience of Captain Rudden when he, in the presence of the ship's representative, and her proctor,

stood in the middle of the tank and held up his hand and found plenty of heat coming from the engine-room bulkhead (69, 70). At that time the vessel was lying at her dock, with the hatch-covers off, and the air from above had free access to the hold. In addition, the main engine at that time was not working (73, 74). The compartment was then as low in temperature as it ever would be, yet the heat from the engine-room bulkhead was noticeable.

Thus it is conclusively established by the uncontradicted testimony that the compartment in which this oil was stowed was not only without any ventilation but, in addition, was subjected to excessive heat because of its location and its immediate surroundings. The ship's negligence in this respect is magnified by reason of the fact that that furnace was selected by the ship's officers for the stowage of this cocoanut oil at the hottest season of the year (170-210), at a time when hot weather was expected (237), and at a time when the ship ought to have taken extra precautions to give good stowage and ventilation to a cargo known to be peculiarly affected by heat. Such gross negligence can hardly be accounted for except upon the theory that the ship's officers thought they could stow the oil anywhere inasmuch as the bill of lading contained the usual provision that the ship would not be liable for leakage.

This compartment was an improper place for the stowage of cocoanut oil.

Appellant has refrained from discussing the propriety of the stowage of the oil in tank No. 5. The

testimony shows that one finding only is possible upon that question. It is the finding of fact made by the trial court—that the stowage of the oil in that compartment was improper. We quote the testimony:

Captain Rinder testified:

> "Q. In your opinion, was that a proper place to stow cocoanut oil?
> A. No.
> * * * * * * *
> A. I say certainly not. (39)
> Q. Will you explain your answer?
> A. No. 5 tank, as now constructed, in my opinion is not fit to carry anything that would be damaged by heat, excessive heat that would come in hot weather, going through the tropics as this ship does, from the engine room." (55)

Captain Lehnhardt testified as follows:

> "Q. What is your opinion, Captain, with respect to the question as to whether No. 5 tank is a proper place for the stowage of any cargo that requires ventilation?
> A. A poor place for it. (60)
> * * * * * * *
> Q. *Could they find a worse place on that ship for the stowage of cargo that required ventilation than No. 5 tank?*
> A. *No.*" (60)

Captain Rudden, a ship master, who not only had considerable experience as chief officer in loading vessels, including the "Korea Maru", but who for several years was in charge of the stevedoring of the Pacific Mail S. S. Company's fleet, testified as follows:

> "Q. In your opinion, is that No. 5 tank a fit place to carry any cargo that requires ventilation?

A. No, it is not a fit place.
Q. Is it suitable for the carriage of cocoanut oil?
A. I should say not.'' (73)

The testimony of Captain Brown (88) and Mr. Gaster (64) is to the same effect.

The record persuasively establishes the unfitness of No. 5 tank as a place for the stowage of cocoanut oil. It would be wrong to stow cocoanut oil in a place beyond the reach of ventilation, even if such place were not adjacent to the engine-room or hot water tank. It was doubly wrong where such place was so adjacent, and it was trebly wrong where, as in this case, the doors opening from the engine-room into No. 5 tank were actually avenues of inlet into the compartment from the engine-room; not ventilators at all, as the ship's officers falsely testified them to be.

In other words, we have here a compartment heated, first, by its juxtaposition to the engine-room and hot water tank, and, secondly, by the pouring into it of hot air from the engine-room out-takes, without any provision whatsoever for ventilation. In these circumstances, the findings of the trial court that

> ''Tank No. 5 was the hottest place on the ship used for the stowage of the cargo'' * * *

and that it

> ''* * * was an improper place for the carriage of this oil''

should not be disturbed by this court.

III.

THE EFFECT OF HEAT ON COCOANUT OIL IN BARRELS.

The testimony shows that heat causes oil to expand and the containers to shrink.

Mr. Tompkins, an industrial chemist of twenty-four years' experience, testified that heat had various effects on oil.

> "* * * one is expansion; it depends on the temperature that the cocoanut oil is subjected to.
>
> Q. A greater temperature has a tendency—the higher the temperature goes the greater the tendency to expand?
>
> A. The higher the temperature the greater the expansion, yes." (144)

Similar testimony was given by Mr. Sanborn, appellant's witness (122, 123).

Captain Curtis also said that the heat would affect the oil (116); so did Mr. Murray (109), all of whom were witnesses on behalf of appellant.

Captain Rudden's testimony upon this subject is convincing.

> "Q. Will you explain why it is that heat causes leakage?
>
> A. Oil expands.
>
> A. Oil expands under heat?
>
> A. Yes, and dries up the barrels—warps the barrels.
>
> * * * * * * *
>
> Q. Then your assumption, to that extent, is based upon what, that the oil expands under heat?
>
> A. Any kind of oil will expand under heat.
>
> * * * * * * *
>
> A. I said excessive heat would cause the barrels to shrink." (80, 81)

Upon the testimony of appellant's witnesses on this subject, the lower court very rightly found that cocoanut oil should not be subjected to heat, the effect of which, as is shown by the uncontradicted testimony of Mr. Tompkins, is to cause the oil to expand.

The effect of heat on the barrels.

The uncontradicted testimony likewise proves that heat shrinks the barrels.

Mr. Broderick, the expert of the California Barrel Company, in testifying upon this subject, said:

> "Q. Mr. Broderick, has heat any effect upon a barrel?
> A. Yes.
> Q. On any kind of a barrel?
> A. Yes.
> Q. What effect has it?
> * * * * * * *
> A. Heat would have the effect of shrinking the barrels." (140)

Captain Rinder, in speaking of the effect of heat, said:

> "Of course, the barrels shrink and the hoops will loosen up." (45)

Captain Curtis, when asked as to whether heat had any effect upon barrels, testified as follows:

> "Q. Has it any effect on the barrels, that you know of?
> A. On empty barrels, or full barrels?
> Q. On full barrels, and if so, what is the effect?
> A. I think it will shrink a barrel—heat will shrink a barrel.
> Q. Do you think it will?
> A. Yes." (284, 5)

The effect of heat on these barrels is evidenced by their condition when discharged. Hoops were off, the barrels had shrunk, and some of the heads were broken.

The combined effect of the heat upon the barrels and the oil, is bound, Captain Rudden says, to cause excessive leakage (80).

Mr. Murray's views are in accord with those of Captain Rudden. He testified:

> "Well, I would be inclined to say that the combined effect of the heat on the oil and the barrels renders it susceptible to seepage." (109, 110)

Obviously, if heat causes the oil to expand, and the barrels to shrink, as the testimony shows it does, excessive leakage is inevitable.

With what grace can a vessel, guilty of placing a cargo susceptible to leakage by heat, in the compartment described, ask the consideration of this court merely because the loss was due to leakage, or because wooden containers sometimes leak?

By accepting such cargo in wooden barrels, the condition of which was apparent at the time of acceptance, the ship owner obligated itself to give it the special care required. As said by the court in

Doherr v. Houston, 123 Fed. 334, 5,

> "In view of such knowledge, and their acceptance of the goods, it was incumbent upon the respondents to stow them in such places and in such manner that they would not be injured by the ordinary contingencies of the voyage."

In

The San Guglielmo, 241 Fed. 969, 977,

the court said:

> a "carrier who accepts goods of a nature which requires special care in their stowage, must exercise such care, and, failing so to do, is liable for the damage caused thereby".

A common carrier is an insurer of the place selected by it for the stowage of such cargo, and must answer for all the consequences to which its negligence contributes. Appellant is, under the conditions existing in this case, within the condemnation of the following authorities.

> "If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the Company, and it should be held liable, notwithstanding the exception in the bill of lading."
>
> *Western Transp. Co. v. Downer,* 11 Wall. 129, 133.
>
> "A shipowner will not be exonerated from losses arising from any of these accepted causes when there has been any neglect on his part to take all reasonable steps to avoid them; or to guard against their possible effects; or to arrest their consequences."
>
> *Carver on Carriage by Sea,* Sec. 16, 6th Ed.
>
> "where the owner's negligence has made that danger operative, the exception of 'danger of the seas', or 'sea perils', in a bill of lading will not avail the owner, because he remains liable for that negligence, as the efficient cause, or causa causans, producing the loss."
>
> *The Manitoba,* 104 Fed. 145, 153, 4.

See also

The Regulus, 18 Fed. 380-382;
Astsrup v. Lewy, 19 Fed. 536;
The Saratoga, 20 Fed. 869-871;
The Victoria, 114 Fed. 962;
The Jeanie, 236 Fed. 463-472;
Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S. 397.

The obvious negligence of appellant in stowing the oil in No. 5 tank contributed directly to the excessive leakage. That is perfectly evident. Under the authorities, its negligence is therefore the proximate cause of the loss.

As the court said in

Gulden et al. v. Hijos, etc., 243 Fed. 780,

> "In the case at bar the evidence shows such stowage that leakage was likely, and of itself might cause the conditions resulting in damage * * *. But the bad stowage in this case would be the proximate cause."

IV.

THE OIL STOWED IN No. 7 HOLD WAS DISCHARGED IN GOOD ORDER AND CONDITION.

Obviously guilty of conscience, and unable to justify placing wooden barrels of cocoanut oil in the very compartment of the ship where heat to an excessive degree was sure to be generated, appellant, for defense, attempts a showing that its negligence is excused by the outcome, but the outcome was not as appellant contends. Its defense is predicated upon

the *false premise* that the oil stowed in No. 7 hold leaked out of the barrels there in the same manner and to the same extent as did the oil that was stowed in No. 5 tank. That was not so, even upon the testimony of appellant's own witnesses. *The testimony of the ship's officers conclusively proves that the oil was discharged from No. 7 hold in good order and condition.* Their testimony, together with that of Mr. Boyer and Mr. Dunn, should outweigh the unsatisfactory testimony of the stevedores referred to in appellant's brief, who could not remember anything about the case other than a general notion that the oil from both holds was in the same condition. None of these stevedores could tell anything about the quantity of the cargo in either hold. They were not employed on the ship in the handling of the cargo from either hold.* They were not stationed in the vicinity of either hold. They were sorters on the dock not engaged to look after any particular cargo. Their duties carried them all over the wharf, sorting all kinds of cargo discharged from the vessel. Hence they had no opportunity to observe the condition of the oil from No. 7 hold. On the other hand, Mr. Dunn, who actually saw the oil in No. 7, and Mr. Boyer, who actually saw the cargo discharged from No. 7, and the ship's master and chief officer, all testified that the oil in No. 7 was in good order and condition. Their testimony upon this subject is conclusive

*Not one stevedore who actually assisted in the discharge of the oil from No. 7 hold was called by appellant. One of them was still in appellant's employ at the time of the trial (136). Instead, dock sorters, still in appellant's employ, were rushed out to court on the day of the trial to testify at the last minute as to facts about which they manifestly were ignorant.

and amply sustains the finding of fact made by the trial court upon this point. We quote the testimony:

Captain Ota testified:

> "Q. What was the condition of the cargo in No. 7 hold when you arrived in San Francisco?
> A. The conditions were good. (233, 234)
> Q. Upon arrival in San Francisco, Captain, what was the condition of the barrels in No. 5?
> A. The conditions were bad. * * *" (233)

The chief engineer of the vessel also stated that the leakage was from No. 5 tank (289).

Again referring to the letter of the ship's chief officer,* we find that he there states that the damage occurred in No. 5 tank. In that letter the following appears:

> "I understand that much leakage found when discharging the cargo at San Francisco was from the barrels which were stowed in No. 5 hold."

Not a word about leakage or damage in No. 7 hold!

Mr. Boyer testified as follows with reference to the condition of oil in both compartments:

> "Q. Do you remember the condition in which the cargo came out of No. 5 tank?
> A. I do.
> Q. Will you describe it?
> A. It was in very bad condition.
> Q. What condition were the barrels in?
> A. Leaking very badly.
> Q. What physical condition were the barrels in?
> A. The hoops were off of some of them, a good many of the hoops, and the staves broken in.
> * * * * * * *

*Libelant's Exhibit "8".

Q. Did you see the barrels that came out of No. 7, Mr. Boyer?

A. I did.

Q. What condition were they in?

A. They were in good condition." (93, 94)

Mr. Dunn, appellant's head stevedore, testified that the barrels in No. 7 hold were in good order and condition. His testimony follows:

"Q. Did you see the barrels of cocoanut oil in that shipment that were stowed in No. 5 tank?

A. I did.

Q. When did you see that with respect to the discharge—while they were discharging it?

A. While they were discharging it.

Q. What condition was that oil in No. 5 tank in?

A. In very poor condition, the barrels leaking.

Q. Will you describe the condition of the barrels as you observed them in No. 5 tank?

A. I remember distinctly that they were leaking very badly. As a matter of fact, my attention was called to the fact that they had got into the oil and I was asked by either the fireman or one of the head assorters to go down and look at the condition of the oil as it came out of the ship.

Q. What did you notice about the barrels?

A. Particularly, that they were open and were leaking—that the oil was leaking out of them.

Q. Did you or did you not notice whether or not any of the heads were off the barrels?

A. I am inclined to think that there were heads off the barrels, that is, some of the barrels the latter end of the discharge of the oil—I am quite sure that many of the heads were off.

Q. Did you notice whether or not any of the barrels were broken or stove in?

A. Some of the heads were out of the barrels, yes.

* * * * * * *

Q. The testimony you have given all relates to the oil that came out of No. 5 tank?

A. Yes.

Q. Did you see the oil in the same shipment that was stowed in No. 7 hold?

A. I saw oil that was stowed in No. 7, but I don't know that it was the same shipment—I would not say positively that it was of the same shipment, but I know that there was oil stowed in No. 7.

Q. What was the condition of that oil in No. 7?

A. I don't remember having seen it being discharged, but I remember standing on the steerage deck by No. 7 when they were discharging freight that had been stowed on top of the oil, and as far as I could see, those barrels were not in bad condition.

Q. Were they in apparent good order and condition?

A. They were apparently in good condition; as I remember, they were only one high on top of the lower hold, that is, the deck." (286-288)

In support of the observation of Mr. Dunn as to the condition of the barrels of oil in No. 7 it may be noted that his recollection of the manner in which they were there stowed is in accord with the testimony of the ship's chief officer. The latter testified that there was one tier only of the barrels in No. 7 hold (165). Thus it is clearly established that his recollection of the conditions existing in No. 7 hold is correct and unanswerable.

If in fact the oil in No. 7 were in the same condition as that discharged from No. 5 tank no one could have failed to observe it. The oil would have been, as it was in No. 5, all over the place. Yet we find the master, the chief officer, the chief engineer, Mr. Dunn and Mr. Boyer, testifying that the oil in No. 7 hold was in good order and condition.

Moreover, other cargo was stowed in No. 7 hold. Is there any evidence of its being damaged by contact with oil? Not a word. Obviously, if the oil in that hold had leaked out of the barrels it would have damaged other cargo stowed there.* The oil would have been running all over the hold.

The soundings indicated, as the chief officer admitted, that the oil was leaking out of the barrels in No. 5 tank. Soundings of the bilges leading from No. 7 hold would also have indicated whether the oil in that hold was leaking. Yet appellant did not offer any evidence on that subject. The reason is obvious. Oil was not found in that bilge.

Written evidence of the condition in which cargo is discharged from various holds of vessels is usually kept by steamship companies. They make such records for their own protection, particularly when cargo is discharged in a damaged condition. Appellant was in the habit of following that usual custom (126). The records kept by it, however, were not produced, despite the fact that a demand was made for them (126). The reason for the refusal is obvious. The failure to produce the record, or to account satisfactorily for not so doing

> "is a circumstance which the court cannot fail to observe, in reaching its conclusion."
>
> *The Prudence,* 191 Fed. 993.

See also,

The Alpin, 23 Fed. 815;
The New York, 175 U. S. 187.

*Oil was the only cargo in No. 5.

Again, it clearly appears that another finding of the trial court is amply sustained by the evidence. The finding of the trial court that there was merely a normal leakage from the oil in No. 7 hold should not, therefore, be disturbed.

V.

COCOANUT OIL IN WOODEN BARRELS HAS BEEN SAFELY TRANSPORTED FOR A GREAT NUMBER OF YEARS.

Cocoanut oil in wooden containers has been transported to this port for a considerable period of time. In fact, we find it was carried in wooden containers as early as 1864. At that time, in the case of

Koebel v. Saunders, 12 W. R. 1106; 17 C. B. (N. S.) 71,

it was urged that stowage of such cargo with loose copra was improper because it would be subjected to excessive heat.

Several shipments have also come into this port with copra as broken stowage, and in each and every such case extensive damage resulted because of the excessive heat generated by copra (44). *There have been shipments, however, in which the oil was carried in wooden containers of the proper kind with a normal or "average leakage of one-half of one per cent"* (147). The mere fact that a great number of shipments of oil in wooden containers have arrived at the port of San Francisco with the small average leakage of one-half of one per cent proves that oil may be safely transported in proper and adequate wooden containers, and indicates that the

cause of the damage in this case was bad stowage, not wooden containers, which all the evidence goes to show were in good condition.

Captain Rinder testified that a number of shipments of cocoanut oil have come into this port in wooden barrels in good order and condition (51).

Mr. Boyer, a large importer of cocoanut oil, testified upon this point as follows:

> "Q. Mr. Boyer, since your firm has been importing cocoanut oil in San Francisco, have you had any cocoanut oil coming in in good order and condition?
> A. I have.
> Q. In what kind of barrels did those shipments arrive?
> A. The same kind as the 'Korea' shipment.
> Q. Could you recall some of the ships that carried cocoanut oil which was in good order and condition?
> * * * * * * *
> A. I can mention a few, the 'Puake', the 'Melville Dollar' and the 'Dix'. I have just those three.
> Q. Are there any others whose names you cannot recall now?
> A. I think there are; yes" (142-143).

The barrels involved in this shipment were properly treated to protect them from the oil (122-142).

The oil stowed in No. 7 hold, in the same kind of barrels as those which contained the oil in No. 5, as before pointed out, and as found by the trial court, came out in good order and condition. Hence, it follows that wooden containers, of the adequate kind here involved, may safely carry cocoanut oil, *provided they are stowed in a cool place and given ventilation.*

Appellant's brief is silent about much that has been clearly established as facts in this case. Among other matters, it is silent about the fact that the barrels, when accepted by the ship, were not leaking or showing any other evidence of their insufficiency to safely transport the oil* (96, 97, 182, 183). Obviously, if they were able to stand for some time a temperature of ninety degrees in Manila (76), without in any wise showing or indicating leakage, it is pretty strong evidence of their sufficiency to contain the oil if properly stowed. It is also persuasive evidence of the excessive heat to which the barrels were subjected in No. 5 tank.

That some of the barrels in No. 5 tank may have been affected differently is not surprising.* Those barrels which were stowed alongside of the engine-room bulkhead were bound to be subjected to a greater degree of heat than those stowed next to the distant bulkhead separating tank No. 5 from No. 6 hold. Those stowed on the hot steel floor of the tank, directly over the engine-room, were bound to suffer to a greater degree than those stowed not so close to the heat. So with those stowed up against the hot sides of the steel man escapes.

The identical defense urged by appellant in this case was rejected by the court in

The David & Caroline, F. C. 3593.

*The bill of lading also acknowledged receipt of the barrels in good order and condition.

*The testimony as to the extent of the leakage in the various barrels discharged from No. 5 tank is of a most general nature. No witness actually examined any barrel from that compartment to ascertain just how much oil may have escaped.

In reversing the decree of the lower court, Circuit Justice Nelson said:

> "But it is insisted by the claimant that the retorts cased in straw were not in a proper state or condition to be shipped with safety for any considerable voyage; and that, if they had been cased in wood or strips, the damage, even stowed as they were, would not have occurred. But there are two answers to this objection—first, the *carrier should not have received them in this condition,* or, if he chose to do so, he *should have seen to it that they were stowed* with reference to the imperfect state of the covering—and, second, *the proofs show that this is not an uncommon or unusual condition in which these articles are shipped.*"

Realizing the weakness of its case, and its inability to answer the convincing testimony in this case, appellant in defense cites three decisions which it says justifies the reversal of the decree of the lower court; a decree which is based upon the testimony and undisputed facts of this case.

The decisions cited by appellant have no application to the facts of this case. This case must be determined on the evidence before the court. The decisions cited were based upon the evidence before the court in each of them. An examination of them, however, will demonstrate that they are not in point.

Wm. Nelson et al. v. John O. Woodruff et al.,
66 U. S. 156,

involved a shipment of lard. The court found as a fact that the stowage was fit and proper. It determined the case on the evidence before it, and merely held that the recitals of the bill of lading did not prevent the carrier from showing that the loss pro-

ceeded from some cause which existed at the time of shipment,

> "* * * which, if shown satisfactorily will discharge the carrier from liability".

In this case there was no such showing. On the contrary, the finding of fact of the trial court upon the point is against the appellant.

The Dunbritton, 73 Fed. 352,

is likewise inapplicable. There the court was concerned with the propriety of stowage of oil with other general cargo, where the latter might be damaged by the leakage of the oil. The mere fact that there may be average leakage in shipments of cocoanut oil is wholly immaterial in this case. We are not here seeking, and we did not seek in the lower court, a recovery for the normal or average leakage of the oil. On the contrary, a deduction was made by the trial court from the entire shipment on account of the normal leakage.

The decision in

The Claverburn, 147 Fed. 850,

must similarly be read in the light of its facts. The barrels in that case were not, as the court found, of the kind suitable for the safe carriage of the oil.

In the case now before the court, we have the finding of the trial court

> "* * * that the barrels were fit and sufficient containers". (307)

In some later case counsel might cite, with equal propriety, the decision of the trial court in this case,

that the containers were sufficient. As before stated, each decision is applicable to the facts before the court only. The question as to whether or not the containers in any given case are sufficient is one of fact—not law.

VI.

APPELLANT FAILED TO PROPERLY CARE FOR THE OIL DURING THE VOYAGE.

Some of appellant's witnesses falsely testified that it was not known aboard the vessel that the barrels in No. 5 tank were leaking. It has been shown that the chief engineer knew that the oil was leaking from No. 5 tank. Moreover, the ship's officers admitted that soundings were regularly taken. Those soundings, we submit, should have informed the ship's officers of the leakage. Cocoanut oil is easily distinguishable from any other oil (294). It is white (294) and would be quite noticeable on the sounding rod (150). The testimony of the ship's carpenter to the contrary (264) is false.

Knowledge of the fact that the oil was leaking from No. 5 tank, as before stated, was admitted by the chief engineer (289). Despite this knowledge, and the possibility of saving it, no effort was made to prevent the loss of the oil. Instead it was pumped overboard in violation of the duty imposed upon the shipowner to properly care for damaged cargo during the voyage.

The Skipton Castle, 243 Fed. 523.

During all of the time that the barrels in tank No. 5 were known to be leaking, steps could have been taken to prevent any further escape of the oil (150, 151, 232).

The lower court, in view of the conclusion reached by it, did not think it necessary to pass upon this question. Nevertheless, we feel that upon this ground, too, the ship is liable.

VII.

PROVISIONS OF THE BILL OF LADING DO NOT RELIEVE THE APPELLANT FROM LIABILITY.

The bill of lading contained a clause similar to those usually found in all oil shipments. It provided that leakage was at owner's risk.

Such a clause does not protect the ship if the leakage is due to negligence or improper stowage, or even if the negligence merely contributes to the leakage. The decisions upon this point are clear and convincing. The provisions of the bill of lading relied upon by appellant merely placed upon appellees the burden of establishing negligence in the care of the cargo, or in its stowage. It does not of itself exonerate the vessel. This is elementary.

Section 2 of the Harter Act, Sec. 8030 U. S. Comp. Stats. 1916;
The Mississippi, 113 Fed. 985;
The Manitou, 116 Fed. 60;
The Good Hope, 197 Fed. 149;
The Skipton Castle, 223 Fed. 839;
The Arpillao, 241 Fed. 282;
The San Guglielmo, 241 Fed. 969;
Gulden et al. v. Hijos etc., 243 Fed. 780.

VIII

SOME OF THE STATEMENTS APPEARING IN APPELLANT'S BRIEF ARE NOT IN ACCORD WITH FACTS.

It did not develop on the trial that the oil when shipped was in a liquid state. Long before the trial commenced it was stipulated that the oil, at the time of its receipt by the ship, was in liquid form (95, 96).

Likewise, it did not develop on the trial that 440 barrels of the oil were stowed in No. 5, and the balance in No. 7 hold. This was an admitted fact, at all times known to both parties.

Appellant's intimation that the allegation of the original libel, to the effect that the heat caused the oil to liquify is important or material, is not sound. An allegation in a case against a common carrier as to the manner in which cargo is damaged is wholly immaterial.

Pacific Coast S. S. Co. v. Bancroft-Whitney Co. et al., 94 Fed. 180;

California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5;

Rainey v. New York & P. S. S. Co. Limited, 216 Fed. 449.

Appellee's damage was not caused by "natural heat", as stated on page 7 of appellant's brief. We have previously shown how that damage was caused.

IX.

THIS IS A PROPER CASE FOR THE APPLICATION OF THE UNIVERSAL RULE THAT THE FINDINGS OF FACT MADE BY THE TRIAL COURT WILL NOT BE DISTURBED ON APPEAL, EXCEPT FOR MANIFEST ERROR.

The rule in cases on appeal in admiralty, where questions of fact only are presented, is that the decision of the trial court will not be reversed except for manifest error. This well-settled rule has been followed by an unbroken line of authority in this circuit.

The Bailey Gatzert, 179 Fed. 44;
The Dolbadarn Castle, 222 Fed. 838;
The Hardy, 229 Fed. 985;
The Beaver, 253 Fed. 312.

We respectfully submit that the decree of the District Court should be affirmed, with interest and costs.

Dated, San Francisco,
March 1, 1921.

Edward J. McCutchen,
Farnham P. Griffiths,
McCutchen, Willard, Mannon & Greene,
Proctors for Appellees.